

I. Introduction

The Fair Housing Act was enacted on April 11, 1968, on the heels of Martin Luther King Jr.'s assassination and the federally authorized Kerner Commission report, which concluded that America was "moving toward two societies, one black, one white – separate and unequal."¹ In an effort to eradicate both separation and inequality in housing, the Fair Housing Act and its progeny establish that the civil right to "fair housing" encompasses the right to choose and enjoy housing, regardless of personal characteristics such as race, sex, and handicap. The exercise of such a right requires freedom from the impediments of discriminatory rental, sales, and lending practices, segregative zoning and land use decisions by governments and housing programs, and other barriers to equality.

This section of the Analysis of Impediments to Fair Housing will outline a legal framework for understanding and applying fair housing principles. A working knowledge of fair housing laws is essential for policy makers, not only to ensure statutory compliance, but to recognize the limitations of said laws and the need for an expansive policy approach to affording equal opportunity in housing. Fair Housing is a vast and complex area of statutory and case law, and it is important to note that this section is not intended to be an exhaustive explanation of all applicable fair housing laws, but rather an introductory framework.

II. Legal Theories of Fair Housing

A. *Standing to sue: Proper Plaintiff*

Under fair housing laws, any "aggrieved person," or any person who suffers an injury or is about to suffer an injury because of a discriminatory housing practice has standing to file a lawsuit in federal or state court or to file an administrative complaint with the appropriate agency. An aggrieved person need not belong to a category of persons delineated under the applicable fair housing law. For example, a mother who is denied housing because of the handicap of her child would have standing to sue, as would a Caucasian person who is deprived of the opportunity to live in a racially diverse community because minorities are being steered away from that community.²

¹ Kerner Commission. March 1, 1968. *Report of the National Advisory Commission on Civil Disorders*. Washington, D.C.: U.S. Government Printing Office.

² *Trafficante v. Metropolitan Life Insurance*, 409 U.S. 205 (1972) (holding that plaintiffs suffered an injury-in-fact for the loss of interracial associations resulting from living in a racially nonintegrated housing complex, thereby establishing standing to sue even though they had not themselves been the direct victims of discrimination).

Moreover, an aggrieved person need not be a bona fide home seeker to have standing. For example, the United States Supreme Court has held that testers, or persons posing as renters or homebuyers so as to detect unlawful housing practices, may have standing to sue, as would fair housing organizations that divert their resources and/or frustrate their mission to detect and respond to discriminatory housing practices.³

B. *Liability: Proper defendants*

Persons or entities who engage in residential real estate-related transactions are prohibited from engaging in unlawful discrimination. Thus, property owners, property managers, property management companies, real estate companies, real estate brokers and agents, and leasing agents are examples of persons and entities that may be sued under fair housing laws. Moreover, proper defendants under fair housing laws include not only the person(s) performing the discriminatory act, but generally also include that person's employer if the discriminatory act is performed during the course of employment. For example, courts have held that the owner or management company of a property may be held vicariously liable for the discriminatory acts of its agents acting in the scope of their authority or employment (i.e. leasing agents, maintenance staff).⁴

C. *Legal theories for proving discrimination*

With respect to anti-discrimination laws, three methods of proof are primarily applied to attack a variety of discriminatory practices: disparate treatment, mixed motive, and disparate impact.

- Disparate treatment: under the disparate treatment legal theory, the plaintiff has the initial burden to establish a *prima facie* case of discrimination, which varies according to the facts of the case. Generally, a plaintiff establishes a *prima facie* case by producing evidence that she belongs to a protected group, that she was qualified for housing, and that she was denied available housing or treated differently from others similarly or less qualified.⁵ The burden then shifts to the

³ See e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982) (holding that an African-American tester who was misinformed about the availability of an apartment for rent, as well as the fair housing organization that frustrated its mission by employing the tester and devoting significant resources to identify and counteract the defendant's racially discriminatory steering practices, had alleged sufficient injury in fact to support standing to sue under the Fair Housing Act).

⁴ *Meyer v. Holley*, (Supreme Court held that individual owners and officers of companies may be liable on the grounds that the owner or officer controlled, or had the right to control, the actions of the employee).

⁵ See e.g., *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir.), *cert denied*, 498 U.S. 983 (1990); see also Title VII employment discrimination cases *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)).

defendant to articulate a legitimate non-discriminatory reason for its actions; however, the plaintiff has the ultimate burden to prove that the defendant's articulated non-discriminatory reason is a pretext.⁶ The plaintiff may prove pretext by showing that the defendant's non-discriminatory reason is not credible,⁷ or that discrimination was in fact the real reason for defendant's actions.⁷

- Disparate treatment/Mixed motive: proving mixed motive requires the plaintiff to prove that a discriminatory motive played a role in the defendant's decision-making, after which the defendant must prove that it would have made the same decision regardless of the discriminatory motive. Courts vary in their characterization of the plaintiff's ultimate burden in mixed motive cases.⁸
- Disparate impact: dissimilar to the disparate treatment legal theory, the disparate impact theory is applied when the plaintiff is able to prove, i.e., through strong statistical evidence, that a rule or policy, albeit neutral on its face, has an adverse effect on persons protected under fair housing laws.⁹ The defendant must then generally establish that there was a legitimate justification for the policy.¹⁰ The U.S. Supreme Court has held that evidence of some discriminatory intent is necessary for a plaintiff to prevail on a disparate impact housing claim under the Equal Protection Clause of the U.S. Constitution; however the Supreme Court has held that evidence of discriminatory intent is not necessary under a federal statutory prohibition against discrimination.¹¹

⁶ *Id.*

⁷ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

⁸ See e.g., *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (finding liability under the Fair Housing Act and section 1982 of the Civil Rights Act of 1866 where race was a significant factor in the defendant's decision to evict the plaintiff); *Price Waterhouse* (Title VII case finding no liability if the defendant would have made the same decision without the discriminatory motive).

⁹ See e.g., *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4 Cir. 1984) (finding disparate impact based on substantial disparity in evictions between Blacks and Whites); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002) (finding disparate impact on minorities where the community had a smaller proportion of minority residents than the larger geographical area in which Section 8 applicants were drawn, where local preferences applied to the PHA program waiting lists led to significantly fewer minorities actually participating in PHA programs than minorities waiting to participate in PHA programs, and where the justification of need for the residency preferences was not sufficient); see also *Comer v. Cisneros*, 37 F.3d 775 (2 Cir. 1994).

¹⁰ See e.g., *Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (2d Cir. 1988).

¹¹ *Arlington Heights v. Metropolitan Housing Corp.*, 499 U.S. 252 (1977) (employment discrimination case holding that absent evidence of discriminatory intent, the Village of Arlington Heights could not be held in violation of the Equal Protection Clause of the Fourteenth Amendment for denying the rezoning necessary

III. The Federal Fair Housing Act

The Fair Housing Act (FHA), Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act in 1988, is similar in the categories of persons protected to Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment. The Fair Housing Act prohibits discriminatory housing practices against the following protected classes (categories of persons protected under the law):

- Race;
- Color;
- National origin;
- Religion;
- Sex;
- Familial status; and
- Handicap (this term is used interchangeably with “disability” herein)

Discrimination on the basis of familial status and disability is prohibited in the Fair Housing Act as a result of the Fair Housing Amendments Act of 1988.¹² *Additional protections are afforded to other categories of persons under Massachusetts General Laws, Chapter 151B. For further information of Chapter 151B, see the discussion herein, infra section V.*

A. Housing Covered by the Fair Housing Act

The Fair Housing Act applies to the following types of housing:

- Multi-family dwellings with greater than four units, including boarding or rooming houses;
- Multi-family dwellings with four or fewer units if the owner does not live in one of the units;
- Single-family privately owned homes when a real estate broker, agent, salesman, or any person in the business of selling or renting dwellings, is used, and/or discriminatory advertising is used to rent or sell the home; and
- Residentially zoned land and house lots for sale or lease.

The Fair Housing Act prohibitions on age discrimination do not apply to housing for older persons if it is: 1) a state or federal elderly housing program specifically designed and operated to assist the elderly; 2) a dwelling intended for the elderly where 80% of

for the development of low-income housing, even though the denial disproportionately affected African Americans); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment discrimination case in which the Supreme Court holding that the absence of evidence of discriminatory intent does not absolve the defendant from liability under Title VII of the Civil Rights Act of 1964).

¹² 42 U.S.C. § 3604 *et seq.*

the units are occupied by at least one person age 55 or older¹³; or 3) a dwelling intended for the elderly where all residents are age 62 or older.

Although some housing may appear to be exempt under the Fair Housing Act, such an exemption may be lost, for example, if the housing provider uses real estate services or if a discriminatory advertisement is made.¹⁴ *Furthermore, although an exempt property under the Fair Housing Act may preclude a housing discrimination claim under the Fair Housing Act, such a claim may not be precluded under other federal laws or under state or local law, including Massachusetts' civil rights statute Chapter 151B. A discussion on other federal civil rights laws is included herein, infra section IV, and a discussion on Chapter 151B and its exemptions is found herein, infra section V(A).*

B. *Unlawful housing practices under the Fair Housing Act*

The Fair Housing Act prohibits the following conduct against protected classes:

- Refusing to rent, sell, or negotiate for the sale or rental of a dwelling, or to otherwise make unavailable or deny a dwelling;
- Steering persons seeking to rent or buy housing away from or toward a particular area because of their membership in a protected class;
- Discriminating in the terms, conditions, or privileges, services, or facilities in the sale or rental of a dwelling;
- Making, printing, or publishing, or causing to make, print, or publish, any notice, statement, or advertisement that indicates any preference, limitation, or discrimination, or an intention to make such a preference, limitation, or discrimination, with respect to the sale or rental of a dwelling; and
- Representing that a dwelling is unavailable for inspection, rental, or sale when it is in fact available;
- Inducing or attempting to induce for profit any person to sell or rent a dwelling by representations regarding the prospective entry of a protected class into the neighborhood (referred to as "blockbusting");

¹³ 42 U.S.C. § 3607(b)(2); see also Housing for Older Persons Act of 1995 (HOPA).

¹⁴ "After December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 804(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title." 42 U.S.C. § 3603(b)(1).

- Refusing to make reasonable accommodations in rules, policies, practices, or services necessary to afford a disabled person the equal opportunity to use and enjoy the dwelling;
- Refusing to permit reasonable modifications to the premises necessary to afford a disabled person full enjoyment of that premises;
- Failing to comply with handicap accessibility design and construction requirements;
- Discriminating in residential real-estate related transactions and brokerage services; and
- Interfering, coercing, intimidating, or threatening any person in the exercise or enjoyment of rights under the Fair Housing Act, or on account of aiding or encouraging any other person in the exercise or enjoyment of rights under the Fair Housing Act.

C. *Familial status discrimination and occupancy standards*

Familial status is defined under the Fair Housing Act as one or more individuals (under the age of 18 years) that is domiciled either with either a parent or another person having legal custody of such individual or individuals, or the designee of such parent or other person having such custody, with the written permission of such parent or other person. Under the Fair Housing Act, it is unlawful to limit the number of individuals allowed in a dwelling and/or in a bedroom if such a limit has the affect of discriminating against families with children. In 1998, HUD adopted the “Keating Memorandum” to provide guidance as to whether a housing provider’s occupancy restrictions are discriminatory.¹⁵

The Keating Memorandum recognizes the “two heartbeats per bedroom” occupancy standard as a general guideline for fair housing compliance; however, it also provides that such a guideline is rebuttable in view of other factors, such as the number and size of bedrooms, the availability of living space that could be used as a bedroom, and the age of the occupants. For example, a requirement that a couple with a young child live in a two-bedroom instead of a one-bedroom apartment would likely be found discriminatory.

D. *Government Discrimination in housing: zoning, land use, and public housing*

¹⁵ Memorandum from Frank Keating to All Regional Counsel, HUD, Re Fair Housing Enforcement Policy: Occupancy Cases (Mar. 20, 1991); Department of Housing and Urban Development, “Fair Housing Enforcement—Occupancy Standards Notice of Statement of Policy,” 63 Fed. Reg. 243 (December 18, 1998) (stating HUD will consider the factors in the Keating Memorandum when evaluating housing discrimination complaints alleging a housing provider’s occupancy policies violate the Fair Housing Act on the basis of familial status).

Courts have interpreted the Fair Housing Act to prohibit state and local governments from exercising their land use and zoning authority, as well as their authority to provide residential services and benefits, in a discriminatory fashion. For example, local zoning laws that treat groups of unrelated persons with disabilities less favorably than similar groups of unrelated persons without disabilities has been held to violate the Fair Housing Act.¹⁶ Persons with disabilities are entitled to request reasonable accommodations in rules, policies, practices, or services under the Fair Housing Act; as such, group homes for the disabled must be given the opportunity to seek a waiver to zoning restrictions.¹⁷ Government discrimination held to be unconstitutional includes enforcement of discriminatory restrictive covenants.¹⁸

Courts have also held that government policies that have a disparate or segregative effect on minorities are in violation of the Fair Housing Act.¹⁹ Even absent direct evidence of intentional discrimination by local government, the provision of financial support for segregated housing despite knowledge of segregation may engender Fair Housing Act liability.²⁰ Moreover, claims of ignorance of segregation patterns are likely to be unsuccessful, as government entities have duties to investigate how their funds are being used.

E. *Enforcement of the Fair Housing Act*

With respect to Fair Housing Act violations, HUD's Office of Fair Housing and Equal Opportunity (FHEO) investigates and enforces discriminatory housing practices occurring or continuing to occur within one year of the filed complaint. If after the investigative process HUD determines that there is probable cause to conclude that unlawful housing discrimination occurred, the complainant may elect to have their case heard before an Administrative Law Judge ("ALJ"), or litigated in U.S. Court with

¹⁶ Massachusetts General Laws Chapter 40A (The Zoning Act) also prohibits health and safety laws or land-use requirements that constitute such discrimination against congregate living arrangements of non-related disabled persons.

¹⁷ See e.g., *Groome Resources Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir.2000) (holding that Jefferson Parish's failure to entertain a waiver of its zoning policy as a reasonable accommodation for Groome Resources' proposed group home for persons with Alzheimer's disease violated the Fair Housing Act).

¹⁸ See *Shelly v. Kraemer*, 334 U.S. 1 (1948) (state enforcement of racial restrictive covenants is unconstitutional).

¹⁹ See e.g., *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986) (holding that there was sufficient evidence to infer racial animus by city officials, who were acting on behalf of constituents seeking to exclude minorities from their neighborhoods, to concentrate public housing in an area predominantly inhabited by minorities).

²⁰ *Young v. Pierce*, 685 F. Supp. 975, 978 (ED Tex. 1988) (holding HUD liable for knowingly maintaining and perpetuating racially segregated public housing by failing to take desegregation action).

representation by the U.S. Attorney General. The Department of Justice may bring discrimination lawsuits based upon a "pattern or practice" or an issue of general public importance. An aggrieved person may directly file a lawsuit in federal court within two years of the occurrence or continued occurrence of the alleged discriminatory practice, without filing an administrative complaint with HUD.

HUD will refer complaints alleging discrimination under the Fair Housing Act to state or local public agencies for investigation and enforcement if it has certified that said agencies enforce a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to the Fair Housing Act. Thus, in Massachusetts, many complaints alleging discriminatory housing practices that are prohibited under the Fair Housing Act are referred to the Massachusetts Commission Against Discrimination, the Boston Human Rights Commission, and the Cambridge Human Rights Commission.

IV. Other Federal Civil Rights Laws

Section 1981 and 1982 of the Civil Rights Act of 1866

Sections 1981 and 1982 of the Civil Rights Act of 1866 provide that all citizens shall have the same right to make and enforce contracts²¹ and to inherit, purchase, lease, sell, and convey real property as White citizens.²² Enforcement may be sought by filing a lawsuit in court. Legal principles applied under the Fair Housing Act are similarly applied to Sections 1801 and 1802 of the Civil Rights Act of 1866. For example, establishing a prima facie case under the Fair Housing Act in a racial discrimination case also establishes a prima facie case under sections 1981 and 1982.²³ Section 1982 significantly enhances fair housing protections on the basis of race and color by providing for equal rights with respect to inheriting and conveying real property.²⁴ However, Section 1982 only provides for equal protection of U.S. Citizens.

²¹ 42 U.S.C. §1981 (stating "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

²² 42 U.S.C. §1982 (stating "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

²³ See e.g., *Steptoe v. Savings of America*, 800 F. Supp. 1542 (N.D. Ohio 1992).

²⁴ See e.g., *Scott v. Eversole Mortuary*, 522 F.2d 1110 (1975) (holding that under § 1982 all citizens have the same rights as White citizens to inherit, purchase, lease, sell, hold, and convey real or personal property, and that § 1982 prohibits private and public discrimination in the sale of property).

Title VI of the Civil Rights Act of 1964

Title VI states that no person "in the United States" shall be discriminated against on the basis of race, color, or national origin by an entity receiving federal financial assistance."²⁵ The entity must perform governmental functions, or be principally engaged in the business of providing education, health care, housing, social services, or parks and recreation. The Department of Justice and HUD have also issued guidance on national origin discrimination against individuals with limited English proficiency.²⁶ Enforcement of Title VI is primarily conferred on those federal agencies extending financial assistance to the program or activity. The primary means of enforcing compliance is through voluntary agreements with the recipients, with fund suspension or termination as a means of last resort.²⁷ Enforcement may also be sought through private lawsuits.

Section 109 of the Housing and Community Development Act of 1974

Section 109 states that no person in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with federal financial assistance, on the grounds of race, color, national origin, religion, or sex. Section 109 applies to programs or activities funded by HUD's Community Development Block Grant Program (CDBG), as well as by Urban Development Action Grants, Economic Development Initiative Grants, and Special Purpose Grants.²⁸ Enforcement of Section 109 may be sought by filing a complaint with HUD or by filing a private lawsuit.

Age Discrimination Act of 1975

The Age Discrimination Act prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance. The Act applies to all ages, but permits

²⁵ 42 U.S.C § 2000d *et seq.*

²⁶ *Enforcement of Title VI of the Civil Rights Act of 1964-National Origin Discrimination Against Persons with Limited English Proficiency*, Fed. Reg. Vol. 65, No. 159, Wed., August 16, 2000, p. 50123; *Notice of Guidance to Federal Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, Fed. Reg., December 19, 2003.

²⁷ Title VI also provides that the Attorney General shall issue guidelines for establishing reasonable time limits on efforts to secure voluntary compliance, on the initiation of sanctions, and for referral to the Department of Justice for enforcement where there is noncompliance. See *supra* note 24.

²⁸ 42 U.S.C. § 5309; 24 C.F.R. 6.

federal programs or activities to provide benefits or assistance to persons, such as the elderly, based upon their age.²⁹

The Act authorizes the head of any federal department or agency who prescribes regulations under the Act to terminate or to refuse to grant assistance under the program or activity involved to any recipient found to have violated the applicable regulation after reasonable notice and opportunity for hearing.

Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 prohibits the exclusion of disabled persons from participating in, being denied the benefits of, or being subjected to discrimination under any program or activity receiving federal financial assistance (excluding vouchers or tax-credits) or under any program or activity conducted by any Executive agency or by the United States Postal Service.³⁰ HUD enforces Section 504 against housing programs funded by HUD through its administrative complaint process. The U.S. Department of Justice also has authority to enforce Section 504, and enforcement may be sought through private lawsuits as well. A further discussion of Section 504 is found herein, *infra* section VII.

Title II of the Americans with Disabilities Act (ADA)

Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination in housing that is owned, operated, or substantially financed by a state or local government entity.³¹ HUD enforces Title II when it relates to state and local public housing, housing assistance, and housing referrals. The U.S. Department of Justice also has authority to enforce Title II of the ADA, and enforcement may be sought through private lawsuits as well. A further discussion of Title II is found herein, *infra* section VII.

Title III of the Americans with Disabilities Act ADA)

²⁹ 42 U.S.C. §§ 6101-6107. (The act does not apply to a program or activity that takes action “that reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity or the differentiation made by such action is based upon reasonable factors other than age,” and states “The provisions of this chapter shall not apply to any program or activity established under authority of any law which provides any benefits or assistance to persons based upon the age of such persons; or establishes criteria for participation in age-related terms or describes intended beneficiaries or target groups in such terms.”).

³⁰ 29 U.S.C. § 794.

³¹ 42 U.S.C. §§ 12131 *et seq.*

Title III of the ADA is far less reaching than Title II with respect to housing because it prohibits discrimination in *privately* owned public accommodations; however, housing providers are obligated to comply with Title III in public areas such as a rental office in an apartment complex.³² The U.S. Department of Justice has authority to enforce Title III of the ADA, and enforcement may also be sought through private lawsuits.

United States Constitution

The Thirteenth Amendment (1865) abolishes slavery and involuntary servitude within the United States, and has also been interpreted to prohibit the “badges and incidents” of slavery, such as segregation.³³

The Equal Protection clause of the Fourteenth Amendment (1868) prohibits state action, and federal action by application to the Fifth Amendment (1791), that deprives any person of the equal protection of the laws. The Equal Protection Clause applies to public housing authorities and some privately owned publicly subsidized housing units.³⁴ Similarly, the due process clause of the Fifth Amendment prohibits federal action that deprives any person of the equal protection of the laws.³⁵

Government action that denies equal protection to suspect classes such as race has been subject to strict judicial scrutiny, whereby the government has the burden of establishing that it has a compelling interest and no less restrictive alternative for creating or engaging in a discriminatory policy or practice. Alleged equal protection violations towards other categories of people, such as women and the disabled, have been subjected to less stringent judicial scrutiny.³⁶

V. Massachusetts General Laws, Chapter 151B

³² 42 U.S.C §12181 *et seq.*

³³ See *e.g.*, *Baker v. McDonald's Corp.*, 680 F. Supp. 1474 (S.D. Fla. 1987), *aff'd*, 865 F.2d 1272 (11th Cir. 1988), cert denied, 110 S. Ct. 57 (1989).

³⁴ See *e.g.*, *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982).

³⁵ See *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment's due process clause provides for equal protection).

³⁶ Strict scrutiny has been applied to “suspect classifications” such as race, national origin, religion, and alienage in some cases, as well as classifications burdening fundamental rights; the U.S. Supreme Court has also articulated two additional levels of scrutiny. “Intermediate scrutiny,” which has been applied to classifications based on gender and children of illegal aliens, requires that a law be “substantially related” to an “important” government interest; “rational basis” scrutiny requires that laws that categorize on some other basis, such as mental disability or sexual orientation, be “reasonably related” to a “legitimate” government interest.

With respect to prohibited discriminatory housing practices, Chapter 151B closely mirrors the Fair Housing Act. However, Chapter 151B has significantly expanded the classes of individuals protected under the Fair Housing Act.³⁷ The additional protected classes are:

- Age;
- Marital status;
- Sexual orientation;
- Ancestry;
- Recipients of public or rental assistance³⁸; and
- Military history

Chapter 151B also specifically states that it is unlawful “to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space.”³⁹ However, to ensure compliance with civil rights requirements, records on race, color, ethnicity, religion, age, gender, and disability are collected by federal programs.⁴⁰ Furthermore, local housing agencies must collect information on minority households in order to satisfy the affirmative fair marketing and tenant selection requirements under 760 C.M.R. 47.08. Housing providers or administrators for subsidized programs also request information from households on family size and the existence of a disability in order to allocate an appropriately sized and/or accessible unit.⁴¹

Chapter 151B does not apply to dwellings containing three apartments or less, if one of the apartments is occupied by an elderly or infirm (disabled or suffering from a chronic illness) person “for whom the presence of children would constitute a hardship.”

³⁷ M.G.L. c. 151B.

³⁸ M.G.L. c. 151B(10) states it is unlawful “For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.”

³⁹ Id.

⁴⁰ *Meeting Local Housing Needs: A Practice Guide for Implementing Selection Preferences and Civil Rights Requirements in Affordable Housing Programs*. Citizens’ Housing and Planning Association. September 2004.

⁴¹ Id.

Familial status is also protected under the Massachusetts Lead Paint Law, which prohibits the refusal to rent to families with children under six, or the eviction or refusal to renew the lease of families with children under six, because of lead paint.⁴²

A. *Housing Covered by Chapter 151B*

Chapter 151B of the Massachusetts Anti-Discrimination Act is broader than the Fair Housing Act in that it applies to all multi-family housing, except owner occupied two-family housing and single-family dwellings that are temporarily leased or subleased for one year or less. Chapter 151B also applies to any organization of unit owners in a condominium or housing cooperative.

Housing for older persons is also exempt from the age discrimination provisions of Chapter 151B where the housing is: state-aided or federally-aided housing developments for the elderly; assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over; consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over, on 1 parcel or on contiguous parcels of land, totaling at least 5 acres in size.⁴³ Chapter 151 B was recently amended by Chapter 291 of the Acts of 2006, which strikes out the land area requirement and instead requires that the housing owner or manager of age-restricted housing constructed on or after January 1, 2007, register biennially with the department of housing and community development. Chapter 151B also states that housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in the Fair Housing Act.⁴⁴

Although some housing may not be exempt under Chapter 151B, it may be exempt under the Fair Housing Act. In such cases, a complaint alleging a discriminatory housing practice may be brought under Chapter 151B and not under the Fair Housing Act. A further discussion on Chapter 151B and its exemptions is included herein, infra section III(A).

B. *Familial Status Discrimination and Occupancy Standards*

⁴² M.G.L. Chapter 151B § 4(6).

⁴³ The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq." M.G.L. c. 151B §6, 7.

Chapter 151B states that is unlawful to discriminate against persons intending to occupy the premises with a child or children, but it does not negate or limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling.⁴⁵

C. *Government Discrimination in housing*

Exemptions from zoning regulations provided in Section 3 of Chapter 40A of the Massachusetts General Laws includes land use for religious purposes if the land is owned or leased by the Commonwealth or any of its agencies, or by a nonprofit educational corporation (otherwise known as the “Dover Amendment”).⁴⁶

Chapter 40A Section 3 also explicitly states that local land use and health and safety laws and practices shall not discriminate against disabled persons, including land use requirements on congregate living arrangements among non-related disabled persons that are not imposed on families and groups of similar size or other non-related persons.⁴⁷

D. *Enforcement of Massachusetts Anti-Discrimination Laws*

With respect to Chapter 151B violations, the Massachusetts Commission Against Discrimination (MCAD) in turn investigates and enforces discriminatory housing practices occurring or continuing to occur within 300 days the filed complaint.

Complaints generally must be filed in person at the MCAD offices in Boston or Springfield, unless the complainant is represented by an attorney. MCAD does not generally accept complaints by phone unless the complainant is deaf, hard of hearing.

⁴⁴ M.G.L. c. 151B § 4(11).

⁴⁵ “No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.” M.G.L. 40 § 3 (the Dover Amendment was enacted in response to a zoning by-law passed by the town of Dover, Massachusetts, prohibiting religious schools within Dover’s residential neighborhoods. *See Attorney General v. Dover*, 327 Mass. 601, 603-04 (1951)).

⁴⁶ M.G.L. 40 § 3.

Complaints may be filed with MCAD regardless of immigration status, and MCAD will not question your citizenship or request a copy of your documentation. Further information on filing a complaint with MCAD may be found at <http://www.mass.gov/mcad/filing.pdf>.

If after the investigative process MCAD determines that there is probable cause, or sufficient evidence to support a conclusion that unlawful discrimination may have occurred, the complainant may elect to have their case resolved by MCAD through a hearing, or litigated in state court. If a complainant elects a hearing and does not have an attorney, an MCAD attorney will prosecute the case on behalf of the Commission. If a complainant elects litigation in state court, the Massachusetts Attorney General will prosecute the case on behalf of the complainant in superior court. Aggrieved persons may directly file a lawsuit in superior court within three years of the occurrence or continued occurrence of the alleged discriminatory practice, without filing an administrative complaint with MCAD, or 90 days after filing a complaint with MCAD.

Complaints alleging discrimination occurring in Boston or Cambridge may also be filed with the Boston Fair Housing Commission (BFHC)⁴⁸ and the Cambridge Human Rights Commission⁴⁹ respectively. Said complaints may be filed on the basis of race, color, sex, age, ancestry, disability, children, national origin, source of income,⁵⁰ military status, marital status, religion, and sexual preference, and must be filed within 180 days of the last discrimination incident.

⁴⁷ Boston Fair Housing Ordinance, C.B.C., Ordinance 10, § 152(1).

⁴⁸ Cambridge Fair Housing Ordinance, chapter 14.04.

⁴⁹ BFHC defines "source of income" as "income from all lawful sources, including but not limited to, public benefits, public subsidies, insurance or investment of any sort, alimony or child support, businesses, and employment or professional services of any sort," C.B.C. 10, § 1.02(0); CHRC defines "source of income" as "receipt of public reciprocity...(which) shall not include income derived from criminal activity," 14.04.030(T).

VI. Other Massachusetts Anti-Discrimination Laws

Massachusetts General Laws Chapter 184 § 23B

Chapter 23B renders any provision in an instrument relating to real property void, with some exceptions, if it directly or indirectly limits the conveyance, encumbrance, occupancy, or lease of that property to individuals to a specified race, color, religion, national origin, or sex.⁵¹

Massachusetts General Laws Chapter 12 § 11H and 11I

Chapter 12 § 11H provides that the Massachusetts attorney general may bring a civil action in the name of the Commonwealth for an injunction or other appropriate equitable relief against any person(s) interfering with a person(s) rights under the U.S. Constitution or Massachusetts Constitution through actual or attempted threats, intimidation, or coercion. Chapter 12 § 11I provides for a private cause of action for such violations.

Massachusetts Equal Rights Law

The Massachusetts Equal Rights Law was adopted in 1990 and was inspired by the federal Civil Rights Act of 1866, which designated the right to contract as an enforceable civil right. Section 102 of the Equal Rights Law provides that any person, regardless of sex, race, color, creed or national origin, except as otherwise provided by law, shall have equal rights to contract, as well as the right to inherit, to purchase, to lease, to sell, to participate in law suits and to receive the full benefit of the law.⁵²

⁵⁰ M.G.L.A. c. 184 § 23B (stating “A provision in an instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, color, religion, national origin or sex shall be void. Any condition, restriction or prohibition, including a right of entry or a possibility of reverter, which directly or indirectly limits the use for occupancy of real property on the basis of race, color, religion, national origin or sex shall be void, excepting a limitation on the basis of religion on the use of real property held by a religious or denominational institution or organization or by an organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization.”).

⁵¹ Mass. Const. Amend., Art. CXIV.

⁵² M.G.L. c.93 § 102 (stating All persons within the commonwealth, regardless of sex, race, color, creed or national origin, shall have, except as is otherwise provided or permitted by law, the same rights enjoyed by white male citizens, to make and enforce contracts, to inherit, purchase, to lease, sell, hold and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other).

Section 103 provides similar rights to any person regardless of disability or age, as defined under Chapter 151B, with reasonable accommodation.⁵³ Enforcement of the Massachusetts Equal Rights Law takes place through the courts.

Article CXIV of the Massachusetts Constitution

The Massachusetts Constitution was amended in 1980 to preclude discrimination against handicapped individuals under any program or activity within the Commonwealth.⁵⁴ Article CXIV parallels Section 504 of the Rehabilitation Act, excepting the federal financial assistance requirement. Article CXIV is generally only applied when public policy has been violated and there is no alternative viable statutory means for addressing the discrimination.⁵⁵ Enforcement of Article CXIV is through the courts.

VII. Fair Housing Rights of Disabled Persons

In addition to the fair housing rights discussed thus far, disabled persons also enjoy numerous protections under various civil rights laws,⁵⁶ including the following:

A. Fair Housing Act

Pursuant to the Fair Housing Act, discrimination against disabled persons includes the refusal to make a reasonable accommodation and/or modification for disabled persons. Determinations as to whether an accommodation or modification request is reasonable is made on a case-by-case basis. Under the Fair Housing Act, a disabled person (now used interchangeably with the term handicap) is defined as:

- having a physical or mental impairment which substantially limits one or more of such person's major life activities;
- having a record of such an impairment; or

⁵³ M.G.L. c.93 § 103 (stating "any person within the commonwealth, regardless of handicap or age as defined in chapter one hundred and fifty-one B, shall, with reasonable accommodation, have the same rights as other persons to make and enforce contracts, inherit, purchase, lease, sell, hold and convey real and personal property, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article CXIV of the Amendments to the Constitution.").

⁵⁴ M.G.L. c. 22, § 13A.

⁵⁵ See e.g., *Layne v. Superintendent*, 406 Mass. 156 (1989).

⁵⁶ For further information, see *Meeting Local Housing Needs: A Practice Guide for Implementing Selection Preferences and Civil Rights Requirements in Affordable Housing Programs*. Citizens' Housing and Planning Association. September 2004.

- regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

A “reasonable accommodation” is a change in rules, policies, practices, or services that is necessary to afford such person equal opportunity to use and enjoy a dwelling, without posing an undue financial or administrative burden to the housing provider, or fundamentally altering the nature of the housing provider’s operations. Examples of a reasonable accommodation include waiving a “no animals” rule for a disabled individual in need of a service animal, or permitting a disabled individual to have a reserved parking space closer to his/her unit.

A “reasonable modification” is a change to the existing premises occupied or to be occupied by a disabled person that is necessary to afford such person full enjoyment of the premises. Examples of reasonable modifications include constructing ramps into units and widening doorways for wheelchair access. The Fair Housing Act does not obligate the housing provider to cover the cost of the modification, although it must permit the modification to be made. In a rental situation, the housing provider may reasonably condition permission for a modification on the tenant’s agreement to restore the interior of the premises to the condition that existed before the modification (excepting reasonable wear and tear).

The Fair Housing Act also requires compliance with design and construction accessibility requirements in multifamily dwellings with first occupancy after March 13, 1991. A multifamily dwelling with four or more units and an elevator is required to have all units handicap accessible. A multifamily dwelling with four or more units without an elevator is required only to have the ground floor units handicap accessible.

Covered multifamily dwellings must comply with the following requirements:

- the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
- all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
- all premises within such dwellings contain the following features of adaptive design.⁵⁷

⁵⁷ Features of adaptive design under the federal Fair Housing Act require: 1) that there is an accessible route into and through the dwelling; 2) light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; 3) reinforcements are in bathroom walls to allow later installation of grab bars; and 4) usable kitchens and bathrooms are such that an individual in a wheelchair can maneuver about the space.

Accessibility requirements under the Fair Housing Act are provided by the Fair Housing Accessibility Guidelines (FHAG). The Fair Housing Act also accepts compliance with the standards of the American National Standard Institute ("ANSI A117.1") with respect to the features of adaptive design. For further information about accessibility requirements under federal law, see the Fair Housing Accessibility First website at <http://www.fairhousingfirst.org/index.asp>.

B. *Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973 (discussed further herein, *supra* IV) requires housing programs to be readily and accessible and usable to persons with disabilities if the dwelling was constructed after July 11, 1988. Section 504 requires accessibility compliance with the Uniform Federal Accessibility Standards (UFAS). Five percent of public housing units must be accessible to tenants with mobility disabilities and two percent must be accessible to tenants with hearing or vision disabilities. For further information on UFAS, see www.access-board.gov/ufas/ufas-html/ufas.htm.

C. *The Americans with Disabilities Act (ADA)*

Title II of the Americans with Disabilities Act of 1990 (ADA) (discussed further herein, *supra* IV) requires that applicable housing be readily accessible to disabled persons if the dwelling was constructed after January 26, 1992. Accessibility requirements under Title II of the ADA are met through compliance with the ADA Accessibility Guidelines (ADAAG) or UFAS. Title III of the ADA⁵⁸ obligates accessibility in public areas such as a rental office in an apartment complex, and accessibility requirements are met through compliance with ADAAG. For further information on ADAAG see <http://www.access-board.gov/adaag/html/adaag.htm>; see also the Title II Technical Assistance Manual at <http://www.ada.gov/taman2.html#II-6.2000>.

E. *Architectural Barriers Act of 1968*

The Architectural Barriers Act requires that buildings and facilities designed, constructed, altered, or leased with federal funds after September 1969 are accessible to and usable by disabled persons in accordance with federal residential accessibility standards.⁵⁹ The Access Board investigates and enforces complaints of non-compliance with the Architectural Barriers Act.

F. *Massachusetts General Laws Chapter 151B*

⁵⁸ 42 U.S.C §12181 *et seq.*

⁵⁹ 42 U.S.C §4151 *et seq.*

An important distinction between Chapter 151B and the Fair Housing Act is that under Chapter 151B, reasonable modifications⁶⁰ must be made at the expense of the owner or other person having the right of ownership in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units. Pursuant to Chapter 151B, an owner or other person having the right of ownership is only required to pay for modifications to make units fully accessible to persons using a wheelchair in ten percent of the units.⁶¹

Chapter 151B also includes specific provisions that have been implied from the Fair Housing Act through judicial decisions. Notably, Chapter 151B specifically states that it is unlawful to discriminate against any person “because such person possesses a trained dog guide as a consequence of blindness or hearing impairment.”⁶²

Massachusetts imposes additional requirements with respect to handicap accessibility than federal civil rights laws. Along with Chapter 151B, which parallels the accessibility provisions of the Fair Housing Act, Massachusetts accessibility requirements are governed by the Massachusetts Architectural Access Law.⁶³ The Massachusetts Architectural Access Law established the Architectural Access Board (AAB) to develop standards for handicap accessibility.⁶⁴

The AAB’s Rules and Regulations establish adaptability and accessibility requirements for both individual units and public and common use spaces in multiple dwellings. The

⁶⁰ “ Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar; provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.” M.G.L. c. 151B § 7A (3).

⁶¹ Id.

⁶² M.G.L. c. 151B.

⁶³ the Architectural Access Board defines “adaptability” as follows: “The ability of certain building spaces and elements, such as kitchen counters, sinks, and grab bars, to be added or altered so as to accommodate the needs of persons with or without disabilities or with different types or degrees of disability.” M.G.L. c. 22 § 13A.

⁶⁴ Massachusetts Commission Against Discrimination regulations state that owner occupied two-family housing is not exempt if: (1) the homeseeker or renter is a recipient of public assistance or housing subsidy; (2) the leasing or rental process utilized the services of a person or organization whose business includes engaging in residential real estate related transactions; or, (3) the availability of the unit is made known by making, printing, publishing, or causing to be made printed or published any notice, statement, or advertisement with respect to the rental of such a unit that indicates any preference limitation, exclusion or discrimination based upon any of the protected classes under Chapter 151B. See 804 C.M.R. 02.00.

AAB accessibility requirements apply to multiple dwellings consisting of three or more units with building permits for new construction issued on or after September 1, 1996, as well as to public and common use spaces in multiple dwellings of 12 or more units with building permits issued before September 1, 1996.⁶⁵ In multiple dwellings with 20 or more units for rent, hire, or lease: at least 5% of the units must be wheelchair accessible, exempting townhouses,⁶⁶ and proportionally distributed by size, quality price, and location; at least 2% of units must be audible accessible. With respect to renovations for residential use, if costs within a three year period exceed 30% of the building's value, new construction accessibility requirements apply. AAB adaptability requirements (not involving structural change) for newly constructed units after September 1, 1996 are similar to those of the Fair Housing Act: in buildings with elevators, all units must be adaptable, and in buildings without elevators, all ground floor units must be adaptable.

Furthermore, buildings subjected to AAB accessibility requirements must provide at least one means of accessible egress; at least two means of accessible egress must be provided when more than one means of standard egress is required by the Massachusetts State Building Code.⁶⁷ For further information about accessibility requirements under the AAB regulations, see the Architectural Access Board website at <http://www.mass.gov/aab>.

The Massachusetts Commission Against Discrimination has also issued regulations in connection with Chapter 151B, which state that newly constructed multi-family dwellings (constructed as of March, 1991) must provide "basic access" for individual units and for public common spaces, and must make five percent of all units wheelchair accessible and two percent communication accessible.⁶⁸

VIII. Protections for Domestic Violence Victims

⁶⁵ 521 C.M.R 1.00-47.00.

⁶⁶ When 5% of the total number of units required to be accessible includes townhouses, they shall comply by any of the following means:

- a. substitute a fully accessible flat of comparable size, amenities, etc.;
- b. provide space for the future installation of a wheelchair lift to access either upper or lower level of townhouse.
- c. provide space for the future installation of a residential elevator to access either the upper or lower level of the townhouse.

⁶⁷ 521 C.M.R. 20.11 ("All *spaces* or *elements* required to be accessible by 521 CMR shall be provided with no less than one accessible *means of egress*. Where more than one *means of egress* is required under 780 CMR (The Massachusetts State Building Code) from any *accessible space* or *element*, each space or element shall be served by not less than two accessible *means of egress*. Exception: For the purpose of 521 CMR 20.11, fire escapes shall be exempt.").

⁶⁸ 804 C.M.R 02.00.

As domestic violence victims are disproportionately women, the treatment of such victims by housing providers may be a fair housing issue. In the case *Bouley v. Sabourin*, the United States District Court of Vermont ruled in 2005 against the defendant's motion for summary judgment, finding that the Fair Housing Act prohibits discrimination against domestic violence victims. In said case, the landlord evicted a domestic violence victim after writing a letter indicating a perception that the tenant did not react appropriately to the domestic abuse in accordance with gender stereotypes. The court found that the plaintiff had established a prima facie case of discrimination, and cited *Cf. Smith v. City of Elyria*, which found there was "evidence on the record from which a jury could find defendant's domestic disputes policy had a discriminatory impact and was motivated by intent to discriminate against women."⁶⁹

The Domestic Violence Against Women Act (VAWA) of 2005 is another federal law that provides protections for domestic violence victims in housing. In addition to creating program funding for long-term affordable and transitional housing for domestic violence victims, the Act provides that public housing and Section 8 providers shall not find domestic abuse as good cause for terminating a lease held by the victim, and that the abuser's criminal activity beyond the victim's control shall not be grounds for termination or eviction.

Pursuant to regulations governing local housing authorities in Massachusetts, a local housing authority may find domestic abuse as mitigating circumstances to a finding of housing disqualification due to damage or disturbance during the tenancy.⁷⁰ Said regulations also provide that local housing authorities provide "reasonable and appropriate assistance" to a tenant who is a victim of domestic violence, including granting a transfer.⁷¹

IX. Fair Lending Laws

Discriminatory lending practices violate the Fair Housing Act, as well statutes such as those indicated below, because of the effect they have on housing opportunities.

The Fair Housing Act and the Massachusetts Anti-Discrimination Statute, Chapter 151B

The Fair Housing Act and Chapter 151B prohibit any person or entity whose business includes engaging in residential real estate-related transactions from discriminating in

⁶⁹ *Cf. Smith v. City of Elyria*, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994).

⁷⁰ 760 C.M.R. 5.08(2).

⁷¹ 760 C.M.R. 5.03. Additionally, 760 C.M.R. 6.04(3)(b) provides that there may be good cause to waive late fees and interest when rent is re-calculated because of the removal of the domestic abuser.

making available such a transaction, or in the terms or conditions of such a transaction, because of a person's membership in a protected class.

"Residential real-estate transactions" is broadly defined as:

- Making or purchasing loans or providing other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling;
- Making or purchasing loans or providing other financial assistance (such as homeowner's insurance) secured by residential real estate; or
- Selling, brokering, or appraising residential real property.

Examples of unlawful lending practices include:

- Requiring more or different information or conducting more extensive credit checks;
- Excessively burdensome qualification standards;
- Refusing to grant a loan;
- Applying differing terms and conditions of loans, including more onerous interest rates and co-signer requirements;
- Denying insurance, or applying differing terms of insurance, in connection with loans;
- "Redlining" neighborhoods (denying mortgages and other credit, or granting unfavorable loan terms, in geographic areas characterized by residents of a protected class);
- Steering individuals to buy and finance homes in a particular geographical area based on their membership in a protected class;
- Making excessively low appraisals

Chapter 151B provides that age may be considered as a factor if the applicant has not reached the age of majority or if age is a pertinent factor in determining credit-worthiness; however, a negative score is not to be assigned to a person on the basis of attaining the age of 62 or older.

The Fair Housing Act and Chapter 151B also make it unlawful to discriminate in the provision of brokerage services by denying access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate in the terms or conditions of such access, membership, or participation, on account of membership in a protected class.

The Massachusetts Predatory Home Loan Practices Act

The Massachusetts Predatory Home Loan Practices Act⁷² requires that lenders with 50 or more home mortgage loans in the last calendar year be examined for their compliance with fair lending laws including the Home Mortgage Disclosure Act (HMDA), the federal Equal Credit and Opportunity Act (see below), and the Predatory Home Loan Practices Act. Examples of predatory lending practices include loan flipping (refinancing of loans repeatedly in a short time, sometimes with prepayment penalties, that strips home equity), excessive fees, concealed fees (i.e., “packing” fees into the loan amount without the understanding of the borrower, or concealing yield-spread premiums in which mortgage brokers are compensated for placing the borrow into a higher than par interest rate), and other types of lending practices that are made regardless of the borrower’s ability to repay that increase the danger of default and foreclosure.

Equal Credit and Opportunity Act of 1974 (ECOA)

The Equal Credit and Opportunity Act (ECOA) prohibits discrimination in *any* aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of assistance from public assistance programs, and the good faith exercise of any right under the Consumer Credit Protection Act.⁷³ If the credit transaction involves residential property, individuals may file a complaint with the HUD or may file a lawsuit in court. Moreover, federal agencies have regulatory authority over certain types of lenders and they monitor creditors for their compliance with ECOA. If it appears that a creditor is engaged in an unlawful pattern or practice, ECOA requires these agencies to refer the matter to the Justice Department.

Federal and State Community Reinvestment Acts (CRA)

The federal Community Reinvestment Act (CRA) requires federally insured depository institutions to meet the credit needs of the entire communities in which they are chartered to do business, including low- and moderate-income urban neighborhoods.⁷⁴ The CRA is enforced by requiring regulatory agencies to consider an institution’s record of meeting community credit needs when evaluating that institution’s application for a deposit facility. The regulatory agencies periodically evaluate banks for CRA compliance, and rate them appropriately. Although the federal CRA does not apply to credit unions and independent mortgage companies, Massachusetts’ CRA statute, M.G.L. c. 167, § 14 (1982), applies additionally to state chartered credit unions.⁷⁵

⁷² M.G.L. Chapter 183C, Section 8.

⁷³ Title VII of the Consumer Protection Act of 1974 (as amended), Section 701 of the Equal Credit Opportunity Act of 1974, Pub. L. 93-49, tit. V, 88 Stat. 1500, 15 USC §§ 1691-1691f.

⁷⁴ 12 U.S.C. § 2901(b) (2000).

⁷⁵ See also 804 C.M.R. 7.00.

Pursuant to the Massachusetts CRA, the Commissioner of Banks has enforcement authority as well as the authority to evaluate the records of supervised institutions in meeting community credit needs in accordance with the statute.

An allegation that minorities are being unfairly served with respect to lending in their communities may draw evidentiary support from data required by the Federal Home Mortgage Disclosure Act of 1975 (HMDA). HMDA mandates that lending institutions whose assets exceed \$28 million and have home or branch offices within a primary metropolitan area annually report the race, sex, and income of mortgage of home loan applicants and borrowers to a variety of federal agencies.⁷⁶ State-chartered institutions do not have to comply with HMDA if their state has substantially similar disclosure laws.

X. Obligation of Housing Programs to Affirmatively Further Fair Housing

The Fair Housing Act requires that HUD and all executive departments and agencies “affirmatively further the Fair Housing Act.”⁷⁷ HUD requires states and localities to certify that they will affirmatively further fair housing as a condition of their receipt of housing and community development funds. Additionally, HUD regulations indicate that pursuant to the Civil Rights Act of 1964, public housing agencies in receipt of federal funds must act affirmatively to overcome limited participation by members of the race, color, and national origin protected classes. Regulations regarding the HOME program (funded by HUD) also make funding conditional on recipients affirmatively furthering fair housing.⁷⁸ Grantees of HUD’s Community Development Block Grant (CDBG) are required by the Housing and Community Development Act of 1974 to affirmatively further fair housing by promoting housing opportunity and accessibility for the classes of persons protected under the Fair Housing Act.

HUD provides examples of potential methods for affirmatively furthering fair housing, such as: establishing fair housing enforcement organizations in needed areas; developing counseling programs promoting housing choice voucher use outside minority and low-income concentrated areas; providing outreach to housing providers outside minority and low-income concentrated areas; marketing available housing to persons less likely to apply for housing in a particular area; encouraging banks and other lending institutions to operate in underserved areas and for underserved populations, and to make credit and loan amount determinations that take are inclusive to protected classes.⁷⁹

⁷⁶ 12 U.S.C § 2801 *et seq.*

⁷⁷ 42 U.S.C. § 3608(d).

⁷⁸ 24 C.F.R. part 92.

⁷⁹ *Promoting Fair Housing*. <http://www.hud.gov/offices/fheo/promotingfh.cfm>.

Liability may arise when there is a failure to affirmatively further fair housing as required. Such a failure may include perpetuating racial segregation patterns and adopting other policies and activities that have a disparate impact on a protected class.

⁸⁰ In *Gautreaux v. Chicago Housing Authority*, the federal District Court of the Northern District of Illinois held that the Chicago Housing Authority and HUD violated the equal protection clause and Title VI of the 1964 Civil Rights Act by locating most of its public housing in African American neighborhoods, and by steering African American applicants away from public housing in Caucasian neighborhoods.⁸¹ More recently, in *Thompson v. HUD*, a federal judge in Baltimore ruled that HUD had failed to regionalize public housing outside poor urban areas and to assist individuals with vouchers in finding residences outside the city that were near employment opportunities and public transportation.⁸²

In Massachusetts, the duty to affirmatively further fair housing has also been enforced. In *NAACP v. Secretary of Housing and Urban Development*, a class action against HUD, the First Circuit Court found in 1987 that HUD failed to ensure that federal funds for the city of Boston were used in a non-discriminatory manner. In *Langlois v. Abington Housing Authority*, the court found that the local housing authority's failure to consider the discriminatory effect of its application procedures and local selection preferences on minorities violated its duty to affirmatively further fair housing.⁸³

Furthermore, the Massachusetts Department of Housing and Community Development (DHCD), through its regulations on affirmative action governing local housing agencies,⁸⁴ incorporates by reference regulations governing affirmative fair marketing and tenant selection.⁸⁵ Such marketing and tenant selection regulations require local housing agencies to “engage in and promote fair housing and tenant selection practices so as to prevent discrimination and segregation and to remedy the effects of past discrimination.”⁸⁶ DHCD also requires local housing agencies to develop and implement

⁸⁰ See *NAACP v. HUD*, 817 F.2d 149 (1st Cir. 1987) (finding that HUD failed to take affirmative steps to address segregated housing in Boston as required by the Fair Housing Act); see *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 (D. Mass. 2002) (adopting Section 8 selection preferences for local residents that yield a discriminatory effect may violate the “affirmatively further fair housing” provision of the Fair Housing Act).

⁸¹ 265 F. Supp. 582 (N.D. Ill. 1969).

⁸² MJG-95-309 (D. Md. 2005).

⁸³ But see *Thomsas v. Butzen*, 2005 WL 2387676 (N.D. Ill.).

⁸⁴ 760 C.M.R. 47.08.

⁸⁵ 760 C.M.R. 33.06.

⁸⁶ *Id.*

a written fair marketing plan. In the event the fair marketing plan is not followed, local housing agencies are required to take corrective measures.⁸⁷

XI. Conclusion

A recent survey by the Civil Rights Project at Harvard University indicated that over half of African Americans and over 40 percent of Latinos said that people of their respective groups believe they “miss out on good housing very often” because they cannot afford it, and 85% of African Americans and 69% of Latinos said their respective groups “miss out on good housing at least some of the time” because of “fear that they will not be welcome in a particular community.”⁸⁸ Moreover, while over a third of Latinos and African Americans would be willing to move to all White neighborhoods, the majority were dissuaded because of perceived discrimination by White homeowners.⁸⁹

Fair Housing choice is vital to Massachusetts residents because it is often linked to employment, transportation, and education choice, as well as to public health and safety. Federal, state, and local enforcement agencies are essential to preventing discriminatory housing practices that impede housing choice in violation of fair housing laws. However, many individuals do not file complaints with enforcement agencies for a variety of reasons discussed in the data analysis section of this report. Moreover, impeded fair housing choice does not only result from discriminatory housing practices directly committed by housing providers, as economic, social, and regulatory forces impede fair housing access as well.

As such, in addition to enforcement efforts, achieving fair housing access in the Commonwealth requires reducing community mechanisms that effectuate exclusivity, augmenting affordable housing stock in a regionally equitable manner, and promoting awareness of diverse housing opportunities. A further discussion of methods for furthering fair housing access is found later in this report.

⁸⁷ 760 C.M.R. 4.08.

⁸⁸ Louie, Josephine. *We Don't Feel Welcome Here: African Americans and Hispanics in Metro Boston*. The Civil Rights Project at Harvard University. April 2005,

⁸⁹ Jackson, Tara D. *The Imprint of Preferences and Racial Attitudes in the 1990s: A Window into Contemporary Residential Segregation Patterns in the Greater Boston Area*. The Civil Rights Project at Harvard University. January 2004.